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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

IN RE

REMELT METALS INC.

Respondent

RCRA VIII-81-10

82 NOV 10 P 2:4

ACCELERATED DECISION

This matter is before the undersigned on a motion for an accelerated decision filed on behalf of the Complainant on August 17, 1982. The delay in rendering a decision on this motion results from a request by counsel for the Complainant that the decision be postponed until the outcome of ongoing settlement negotiations had been completed. By letter dated September 22, 1982, counsel for the Complainant advised the Court that further efforts to settle this matter appear to be fruitless and requested that the Court proceed to render a decision on the motion heretofore filed.

It should be noted at this juncture that the Respondent filed no response to the August motion. 40 CFR §22.16(b) provides that a party's response to any motion must be filed within 10 days after service of such motion unless additional time is allowed for such response, and if no response is filed within the designated period, the parties may be deemed to waive any objection to the granting of the motion. No addi-

tional time was requested by the Respondent nor granted by the Court and although the rules provide that the party failing to file may be deemed to have waived to any objection to the motion, inasmuch as this is a motion going to the liability for the violations alleged in the Complaint, I will treat the motion as though an objection to the granting thereof had been filed.

Discussion

On December 18, 1981, the Complainant issued an administrative complaint to ReMelt Metals Inc. pursuant to §3008(a) of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 USC 6928. The Complaint alleged that the Respondent, ReMelt Metals, was generating hazardous wastes without properly having notified EPA of such activity and that the Respondent was treating, storing and disposing of hazardous wastes without a permit or interim status as required by the Act and that the Respondent did not meet the security requirements of 40 CFR 264.14(a). Respondent filed an Answer to this Complaint on January 21, 1982 in which it also requested a hearing.

In its answer, Respondent set up two alternative arguments in its defense to the allegations of the Complaint: (1) that its battery processing operations are not subject to the hazardous wastes regulations promulgated by EPA pursuant to Subtitle C of RCRA; and (2) if these operations are subject to the hazardous wastes regulations, they are exempt under the recycling exclusion set forth in 40 CFR 261.6. Respondent also set up affirmative defenses in the Answer raising such issues as good faith efforts, reasonable precaution and in addition thereto raised some constitutional defenses. These defenses will not be treated in this accelerated decision.

The Motion

The motion filed by the Complainant (EPA) is made pursuant to 40 CFR 22.20 of the Consolidated Rules of Practice governing these proceedings. The Complainant avers that there are no genuine issues of material fact in this matter and as a matter of law, EPA is entitled to a judgement in its favor on the issue of Respondent's liability for the violations stated in the Complaint. Attached to the motion is an affidavit executed by Vera Moritz, an employee of the EPA with the waste management branch of the Denver regional office. The affiant is an environmental engineer with the hazardous waste facility section. This affidavit addresses the question of the failure of the Respondent to provide security measures surrounding its facility as required by the regulations and also encloses photographs taken by the affiant showing the lack of fencing, gates or other security measures required by the regulations.

The Court corresponded with the Complainant and suggested that one method of disposing of this matter would be for the parties to stipulate as to the facts and let the Court make a ruling both on the question of liability and the assessment of an appropriate fine. By letter dated October 8, 1982 counsel for the Complainant suggested that the Court rule separately on the issues of liability and penalty, and reserve the penalty matter for the hearing and ensuing briefs. I have no particular problem with that procedure and will address this accelerated decision solely to the question of the Respondent's liability for the alleged violations under the Act.

Background

The Respondent's business consists primarily of receiving automobile batteries from outside sources and reclaiming the lead contained therein. In the course of this endeavor, the battery acid contained in the batteries must be disposed of in some fashion. The Respondent disposes of the battery acid in a surface impoundment and a concrete pit. In its original answer, Respondent indicated that it intended to dispose of the acid by chemically neutralizing it to water. However, this procedure does not yet appear to have been instituted and essentially what happens is that the battery acid simply evaporates into the atmosphere without receiving any treatment.

On May 19, 1980, the EPA published in the Federal Register a comprehensive set of regulations governing the handling of hazardous wastes from their inception into commerce until their ultimate disposal. These regulations were promulgated pursuant to the authority given to the EPA under Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 USC 6921 et. seq. In order to give the regulated community an opportunity to become familiar with these regulations and to bring their facilities into compliance, the effective date of the regulations was delayed some six months until November 19, 1980. One of the provisions of the regulations required owners or operators of facilities which treated, stored or disposed of hazardous wastes to file a permit application with the EPA. Part A of this application was to be filed on or before November 19, 1980 (40 CFR 122.22(a)(1)). Facilities which were in existence on November 19, 1980 and which had made timely submissions

of both the Notification form and Part A of the permit application qualified for interim status under §3005(e) of RCRA. A facility which had interim status was permitted to continue operating as a hazardous waste management facility until a final determination was made on its full permit application.

The regulations provide that each generator of solid wastes is responsible for determining whether or not its wastes are hazardous (40 CFR 262.11). Hazardous wastes are identified by chemical characteristics or listed specifically by name in 40 CFR Part 261.

Apparently, the Respondent filed the required Notification form on November 19, 1980 and filed a timely permit application on the same date. These submissions were later withdrawn by letter dated June 5, 1981 on the basis that upon reconsideration the Respondent took the position that the regulations did not apply to it and therefore it did not need to file either the Notification or Part A permit application form.

During an inspection by EPA employees on August 21, 1981, the pH of the acid in the concrete pit and surface impoundment was determined by EPA to be in the range of 0 to 2. In the response to request for admissions filed by the Respondent on or about June 11th, the Respondent admitted that several studies do exist which demonstrate that waste acid from leaded batteries has a pH in the range of 1 to 2 and the Respondent further admitted in that document that it does not have any sampling data from the period of November 1980 through September 1981 which would show that the contents of the impoundment had been neutralized. Wastes having a pH between 0 and 2 are identified by the regulations as hazardous waste by the definition of the corrosivity characteristics. Therefore,

it would appear that on August 21, 1981 both the concrete pit and the surface impoundment owned and operated by the Respondent and containing battery acid did contain a hazardous waste regulated by Subtitle C of RCRA and its implementing regulations. Having made that determination, it necessarily follows that Respondent was required to notify EPA of its activity as a generator and treator of hazardous wastes and to have filed Part A of the permit application for its treatment activities in order to achieve interim status so that they could legally operate the hazardous waste management facility under the Act.

The Respondent in its answer also admitted that it allowed the acid to evaporate rather than being neutralized as was alleged elsewhere. "Disposal" under RCRA is defined at 40 CFR 260.10 as, among other things, the placing of any solid or hazardous wastes into or on any land so that such solid or hazardous wastes or any constituent thereof may enter the environment or be emitted into the air. It would therefore appear that Respondent was also disposing of the hazardous wastes which activity also requires compliance with §3005 of RCRA. Since the notification, application forms were withdrawn on June 5, 1981, Respondent was operating its facility in violation of §3005 and §3010 of RCRA on August 21, 1981. In its Answer the Respondent argues that EPA is somehow responsible for the Respondent's improper withdrawal of these forms. However, the statutes and the regulations clearly put the burden of compliance with their mandates upon the owner or operator of the facility handling hazardous wastes. The Respondent also referred to some report by an independent engineering firm concerning a business which is similar to that of Respondent which report purportedly was endorsed by EPA's

Washington, D.C. Office and other Regional Offices. This report is alleged to support Respondent's position that it is exempt from the requirements of the Act. A copy of this report was not provided by the Respondent and EPA, in its brief, alleges that it does not have a copy of the report in its files nor does it have any information evidencing the report's endorsement by EPA. In any event, the contents of the report is probably irrelevant since it always remains the responsibility of an operator of a facility to make the determination as to whether or not its facility is subject to the provisions of the Act and if he makes a mistake in that determination he must accept the consequences of such error.

The Recycling Exemption

Respondent, as indicated above, takes the position that if it does generate hazardous wastes it is exempt from Subtitle C of the Act by virtue of the provisions applicable to persons who use, re-use, re-claim, or recycle hazardous wastes (40 CFR 261.6).

Persons who use, re-use, recycle or re-claim hazardous wastes which are not specifically listed as such but are hazardous solely because they meet a definition of one of the four hazardous wastes characteristics, outlined in Subpart C of 40 CFR 261, are not required to submit a Notification pursuant to the Act or comply with the permit application provisions. The battery acid wastes in question is a hazardous waste solely because it meets the definition of corrosivity in 40 CFR 261.22. However, in order to avail itself of this exemption, the owner/operator must demonstrate that he is in fact using, re-claiming or recycling the hazardous wastes

in question. In this instance no such showing is made by the Respondent and on the contrary the Respondent admits that he merely disposes of this material in the concrete pit or surface impoundment where it is allowed to evaporate. Since evaporation is a form of disposal as that term is defined by the regulations and the Respondent further admits, in its responses to requests for admission, that to date there has been no recycling it would appear that the exemption mentioned above is not available to the Respondent in connection with its operation and therefore its defense on that basis must fail.

Security Requirements

The security requirements applicable to the Respondent's facility are found in 40 CFR 264.14(a) and provide that:

> "the owner or operator must prevent the unknowning entry, and minimize the possibility for the unauthorized entry of persons or livestock on to the active portion of his facility..."

This regulation contains two separate requirements, to wit: to prevent the unknowning entry into its facility, and to minimize the possibility of the unauthorized entry of persons or livestock into the active portion of the facility. The first provision of the regulation is not at issue here since the violation thereof was not alleged in the Complaint. The Complaint does however allege in count 3 that the Respondent has not adequately met the second requirement, that is, to prevent the unauthorized entry of persons or livestock onto the active portion of the facility.

The affidavit of Respondent's witness, as amplified by the attached photograph, indicates that the Respondent's facility is only fenced on three sides. The east side being completely unfenced. The Respondent admits in its response to the request for admission that the hazardous wastes handling area is located on the eastern edge of the property toward the back of the facility and is therefore not immediately visible from the office or from the front area of the facility. The Respondent initially contended that it employed a security guard and dog on the premises at all times, however, it later amended that statement to say they work on the premises only when the business operations were closed.

In addition to employing one of the two above methods for controlling entry, the Respondent is required to have a means to control entry at all times through the gates or other avenues of ingress to the active portion of the facility. This could be accomplished by the presence of an attendant, television monitor, locked entrances or gates. The diagram in attachment 1 to the brief indicates that the South Pecos Road enters onto the Respondent's property along the eastern unfenced boundary near the surface impoundment. One of the Respondent's employees stated that access to this portion of the facility is controlled by a locked gate. However, the affidavit sworn to by Ms. Moritz states that on August 21, 1981, the date of her inspection, no gate was seen on or near the vicinity where the South Pecos Street enters Respondent's facility. If such a gate existed, as claimed, the photograph attached as part of the affidavit clearly demonstrates that its usefulness would be questionable since anyone could walk around it to the side next to the railroad

tracks. Therefore, it appears that the Respondent has not controlled entry at all times to the active hazardous wastes handling area of its facility and it fails to meet the second requirement set forth in the regulations.

Conclusion

Based on the record before me, consisting of the Complaint, the Answer, the responses to requests for admissions and the affidavit provided by the Complainant, I conclude that: (1) the operations performed on the subject premises by the Respondent are subject to the provisions of the Act and that they are not entitled to the exemption herein above discussed since they do not use, re-use, or recycle the hazardous battery acid but merely place the same in pits or an open impoundment and allow them to evaporate into the atmosphere; (2) the Respondent is in violation of the Act since it has not made the required notifications or applied for an interim status permit. and (3) that it violated the security requirements in that the facility is not properly enclosed and the unauthorized entry of persons or livestock into the active portion of the facility is not adequately protected against.

ORDER

Based upon a complete review of the entire file in this matter, I hereby find that the Respondent has violated the relevant provisions of RCRA in the following particulars:

1. The Respondent is a generator, treator and disposal of hazardous wastes and is therefore subject to the statutory requirements of Subtitle C

of RCRA and its implementing regulations in that it has failed to file a Notification form and a Part A permit application as required by the Act and its regulations.

2. That on the date of the EPA inspection, the Respondent was generating, treating and disposing of hazardous wastes at the facility without a Notification form on file with the EPA, and, therefore, has violated §3010 of RCRA, 42 USC 6930.

3. The Respondent has violated §3005(e) of RCRA in that they were in existence on November 19, 1980 and that they had failed to apply for and receive a Part A interim permit for continued operation of its facility, and, therefore, on the date of the inspection, they were treating and disposing of hazardous wastes without a permit or interim status under §3005 and therefore have violated that provision of the Act.

4. The Respondent has also violated 40 CFR 264.14(b) in that they did not employ suitable means to prevent the unauthorized entry of persons or livestock onto its facility in that the disposal pit was freely accessible to all employees of the Respondent as well as to employees to other facilities located on the same site, therefore, violating 40 CFR 264.14(a)

5. The parties shall advise the Court no later than seven days from the date of this Decision as to how they wish to proceed on the only remaining issue, i. e., the amount of the penalty to be assessed.

DATED: November 8, 1982

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing accelerated decision was served on the Regional Hearing Clerk, EPA Region VIII, and that true and correct copies were served on: Daniel T. Goodwin, Esquire (for Respondent), Dailey, Goodwin and O'Leary, P.C., 10957 E. Bethany Drive, Suite H, Aurora, Colorado 80014; and Susan E. Manganiello, Esquire, U.S. Enivronmental Protection Agency (8E-WE), 1860 Lincoln Street, Denver, Colorado 80295; all service made by Certified Mail, Return Receipt Requested. Dated in Atlanta, Georgia this 8th day of November 1982.

Sandra A. Beck
Secretary to Judge Yost

Judge Thomas B. Yost
Environmental Protection Agency
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